

DOCKET FILE COPY ORIGINAL

SEP 28 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**Amendment of Section 76.51(a) of  
the Commission's Rules to Add  
Castle Rock as a Designated  
Community in the Denver,  
Colorado, Television Market**

MM Docket No.

**To: Chief, Mass Media Bureau**

# PETITION FOR EXPEDITED RULEMAKING

**LESEA BROADCASTING CORPORATION**

**John E. Fiorini, III  
Francis E. Fletcher, Jr.  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900 - East Tower  
Washington, D.C. 20005**

**September 28, 1993**

## Its Attorneys

No. of Copies rec'd.  
List A B C D E

RECEIVED

SEP 28 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 76.51(a) of )  
the Commission's Rules to Add )  
Castle Rock as a Designated ) MM Docket No.  
Community in the Denver, )  
Colorado, Television Market )

To: Chief, Mass Media Bureau

**PETITION FOR EXPEDITED RULEMAKING**

LeSEA Broadcasting Corporation ("Petitioner"), licensee of television broadcast station KWHD, Channel 53, Castle Rock, Colorado, pursuant to Section 1.401 of the Commission's Rules, hereby petitions for amendment of Section 76.51(a) of the Commission's Rules to redesignate television market number 32, presently designated as "Denver, Colorado", as "Denver - Castle Rock, Colorado." Petitioner further requests the Commission to consider this petition under the expedited procedures adopted in its recent Report and Order in MM Docket No. 92-259.<sup>1/</sup>

<sup>1/</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992, FCC 93-144, 8 FCC Rcd. \_\_\_\_\_ (released March 29, 1993) ("Must-Carry Order"). At paragraph 50, the Must-Carry Order provides for issuance of a notice of proposed rulemaking without first seeking public comment on requests such as Petitioner's. Further, Section 76.51, as amended by the Must-Carry Order, includes a Note providing, in part, that petitions for rulemaking "shall not be subject to the public notice provisions of Section 1.403 of this chapter."

## **I. INTRODUCTION AND BACKGROUND**

Station KWHD is licensed to Castle Rock, Colorado, a community located approximately 20 miles due south of Denver on Interstate Route 25. Castle Rock is included within the Denver Metropolitan Statistical Area (MSA), as designated by the U.S. Office of Management and Budget. Castle Rock is included by Arbitron in the Denver Survey Area, Denver Area of Dominant Influence (ADI), and Denver Metro Rating Area. Station KWHD places a Grade B signal over all of Denver and its principal suburbs, including Lakewood, Aurora, Englewood, Wheat Ridge, Arvada, Westminster, Thornton, Golden and Brighton. The coverage area of Station KWHD substantially overlaps the coverage areas of the eight television stations which are licensed to Denver.<sup>2/</sup>

Although Station KWHD is entitled to carriage on Denver-area cable systems under the rules adopted in the Must-Carry Order, such carriage would engender copyright license liability for the cable operators. This is because Section 111 of the Copyright Act, 17 U.S.C. § 111(f), continues to define "local" and "distant" television station signals pursuant to the Commission's old must-carry rules which preceded those adopted in the Must-Carry Order. For purposes relevant to Petitioner's request, the prior must-carry rules include classification of a signal as

---

<sup>2/</sup> The eight television stations licensed to Denver are: KWGN-TV, Channel 2; KCNC, Channel 4; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KTVD, Channel 20; KDVR, Channel 31; KCEC, Channel 50; and KUBD, Channel 59.

"local" where the television station's city of license has "designated community" status in the Commission's Top 100 Market List under Section 76.51 of the Rules. Accordingly, redesignation of the Denver market as "Denver -- Castle Rock" under Section 76.51 as proposed in this Petition, will permit Denver-area cable systems to carry KWHD on an equal basis with other television stations in the market without incurring "distant signal" copyright liability.

**II. PETITIONER'S PROPOSAL MEETS THE "COMMONALITY" REQUIREMENT ESTABLISHED UNDER THE MUST-CARRY ORDER**

The Commission recognized in its Must-Carry Order that its Section 76.51 Top 100 Market List was out of date, having been derived largely from Arbitron's 1970 prime time household rankings. Indeed, the Commission acknowledged that Section 614(f) of the Cable Act of 1992 requires the Commission to make revisions needed to update the list and the designated market communities included in the list.<sup>3/</sup> The Commission further recognized that since Congress had specifically directed the Commission to use current ADI markets for determining must-carry rights, the required updating of Section 76.51 list would primarily affect copyright liability.<sup>4/</sup> The Commission decided, however, that the record was insufficient in the Must-Carry Proceeding (MM Docket No. 92-259) to make wholesale

---

<sup>3/</sup> Must-Carry Order, para. 48.

<sup>4/</sup> Id.

revisions to Section 76.51, concluding that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted.<sup>5/</sup> The Commission stated that it would expect such parties to provide evidence that "demonstrates commonality between the proposed community to be added to a market designation and the market as a whole."<sup>6/</sup>

There is strong evidence of commonality between Castle Rock and the Denver market as a whole. As already noted, Castle Rock is included within the Denver MSA. "The general concept of a metropolitan area [which includes MSA's, CMSA's and PMSA's] is one of a large population nucleus together with adjacent communities which have a high degree of social and economic integration with that nucleus."<sup>7/</sup> Thus, under the federal government's own definition, Castle Rock is recognized as an integral part of the Denver market.

The commonality between Castle Rock and Denver is also reflected in Arbitron's treatment of the Denver market. Thus, Arbitron includes Castle Rock not only within the larger Survey

---

<sup>5/</sup> The Commission made only three modifications to the Section 76.51 list in its Must-Carry Order pursuant to such individual requests: renaming the Columbus, Ohio market to include Chillicothe; adding New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut, market; and changing the Atlanta, Georgia, market to Atlanta-Rome. Must-Carry Order, para. 50.

<sup>6/</sup> Id.

<sup>7/</sup> Statistical Abstract of the United States 1992, 112th Edition, U.S. Department of Commerce, Bureau of the Census, p. 4.

Area, but also within the Denver ADI and Metro Area as well.<sup>8/</sup> The ADI, a standard market definition consisting of all counties in which the home market stations receive a preponderance of viewing, reflects Arbitron's view that Castle Rock and Station KWHG are part of the Denver market. The ADI establishes that, for economic purposes, KWHG participates in a common television market with the stations licensed to Denver.

### **III. PETITIONER'S PROPOSAL MEETS THE TRADITIONAL TEST FOR A HYPHENATED TELEVISION MARKET**

The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market, including competing stations licensed to different cities within that market area.<sup>2/</sup> The Denver market consists of two population centers: Denver and its immediately adjacent suburbs form a single large population center; and the community of Castle Rock, some 20 miles to the south, represents a less populous but distinctly separate population center which, along with Denver and its immediate suburbs, is encompassed within Arbitron's Denver Metro Rating Area and the Denver MSA. Castle Rock is the county seat and the only community of any size in Douglas County, which forms most of the southern "leg", and constitutes a sizable portion, of

---

<sup>8/</sup> Broadcasting & Cable Yearbook, Arbitron ADI Market Atlas, p. C-152.

<sup>2/</sup> Cable Television Report and Order, 36 FCC 2d 143, 176 (1972).

the Denver MSA. (See Exhibit A). Thus, a Denver - Castle Rock hyphenation would meet the first prong of the Commission's definition of a hyphenated market.

The second prong of the definition is also met. Exhibit B hereto, a map depicting the Grade B contours of Station KWHD and the eight Denver television stations, shows clearly that both population centers support all nine stations -- to wit, with the exception of KUBD, Denver (Channel 59), all nine Grade B contours encompass both communities.<sup>10/</sup>

The Commission also has stated that the "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.<sup>11/</sup> This definition is met as well. The Castle Rock station, KWHD, and the stations licensed to the presently designated Section 76.51 community of Denver, have coverage areas that substantially overlap; and, all of these stations do, in fact, compete for audiences throughout the market area. KWHD relies on the entire area encompassed by its Grade B contour for economic support. There can be little doubt that KWHD is unavoidably competing with the other stations in the Denver -- Castle Rock market.

The Commission traditionally has looked to four factors in evaluating individual market conditions consistent with the

---

<sup>10/</sup> Station KUBD's Grade B contour falls just slightly short of Castle Rock.

<sup>11/</sup> CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974).

underlying competitive purpose of the market hyphenation rule:  
(1) the distance between the proposed community and the existing designated community; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the change.<sup>12/</sup>

All four factors are supportive of the proposed redesignation of the Denver market. First, Castle Rock is proximate (20 miles due south) and readily accessible by interstate highway to Denver. By contrast, the redesignation of the Atlanta market as Atlanta-Rome, as approved in the Must-Carry Order, involved communities that are some 56 miles apart.<sup>13/</sup>

The second factor, whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area, would no longer seem to have relevance given that the new must carry rules adopted by the Commission in the Must-Carry Order are keyed to the ADI rather than the Grade B contour looked to under the old must-carry rules. Nonetheless, the proposed modification of Section 76.51 substantially complies

---

<sup>12/</sup> See, e.g., Major Television Markets (Fresno-Visalia, Calif., 57 RR 2d 1122 (1985)).

<sup>13/</sup> It should be noted that the distance between Rome and Atlanta was not ameliorated by co-location of transmitters, a factor sometimes considered by the Commission in addressing the proximity factor. See, Request of TV 14, Inc. to Amend Section 76.51 of the Commission's Rules, 7 FCC Rcd 8591, 8592 (1992).



with this criterion as well since the majority of Denver-area cable systems which would be affected by the rule change are within Station KWHD's Grade B contour. These include cable systems serving the principal Denver suburbs of Lakewood, Aurora, Englewood, Wheat Ridge, Arvada, Westminster, Golden and Brighton.

With respect to the third factor, a particularized need for the proposed rule change exists. Station KWHD already has been notified by several Denver-area cable systems that they will not carry the station because of copyright liability. The need for the proposed amendment to Section 76.51 is thus not theoretical, but real and immediate. Finally, the public will benefit from the proposed redesignation because it will bring to the cable systems in the Denver-area diversified programming from an independent UHF television station.

### III. CONCLUSION

Petitioner's proposed redesignation of the Denver market is consistent with the rationale of the Must-Carry Order, meets the "commonality" standard described therein, and would address the anomalous circumstances created by the treatment of Station KWHD as a "local signal" under the new must-carry rules and as a "distant signal" for copyright liability purposes with respect to Denver-area cable systems. In addition, the requested redesignation meets the standards traditionally applied by the Commission in creating hyphenated markets under Section 76.51 of its Rules. Accordingly, it is requested that the Commission

issue a notice of proposed rulemaking to amend Section 76.51 of the Rules to redesignate the Denver market as "Denver - Castle Rock", in accordance with the expedited rulemaking procedures established in the Must-Carry Order.

Respectfully submitted,

**LESEA BROADCASTING CORPORATION**

By:



John E. Fiorini, III  
Francis E. Fletcher, Jr.  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900 - East Tower  
Washington, D.C. 20005

September 28, 1993

Its Attorneys

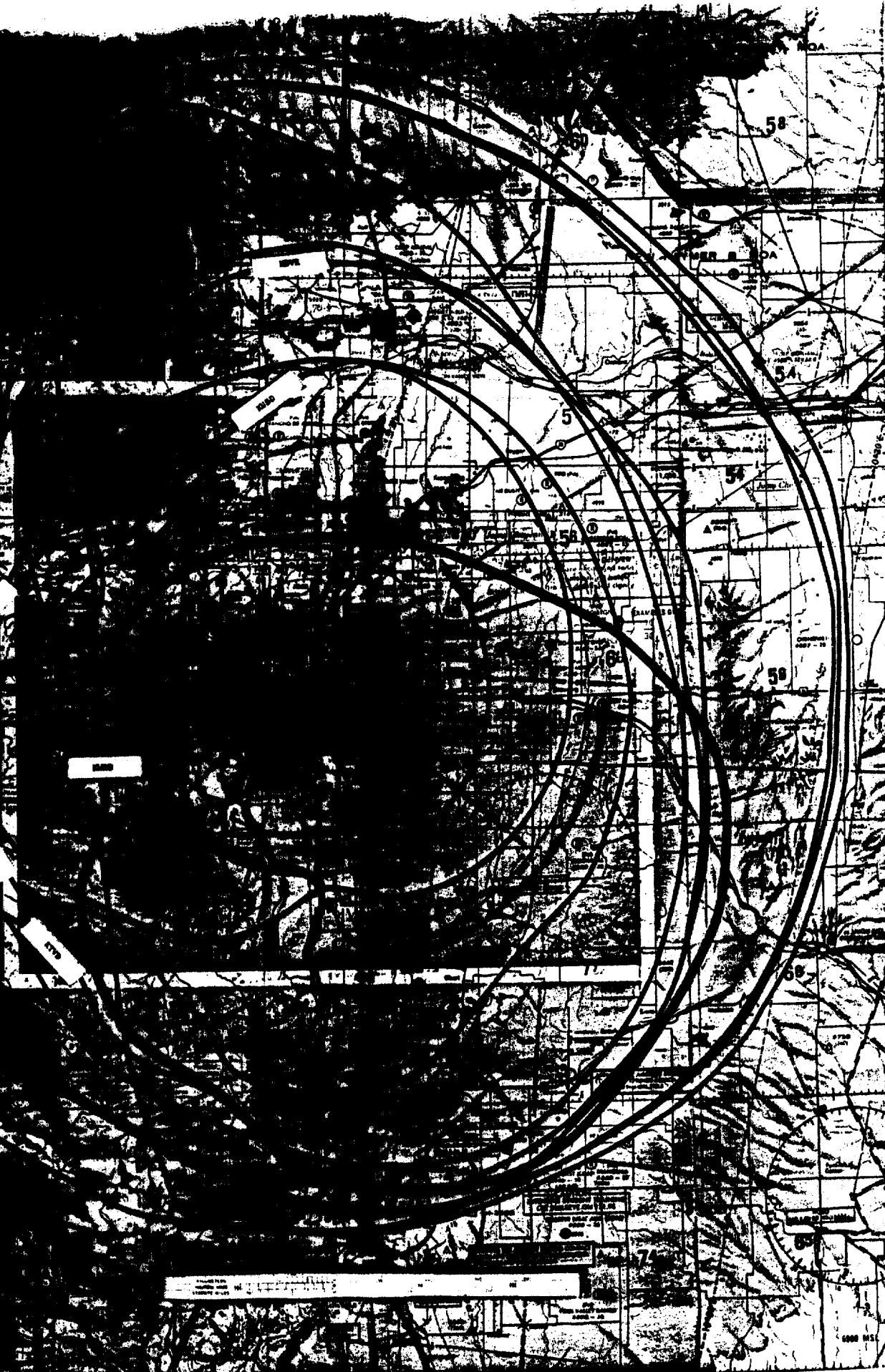
65831-007\53900



GRADE 3 COVERAGE CONTOURS

KWHD  
VS  
KMGH  
KCNC  
KMGH  
KUSA  
KTVD  
KDVR  
KCEC  
KUBD

KWHD-TV53  
LOWE BROADCASTING CORPORATION

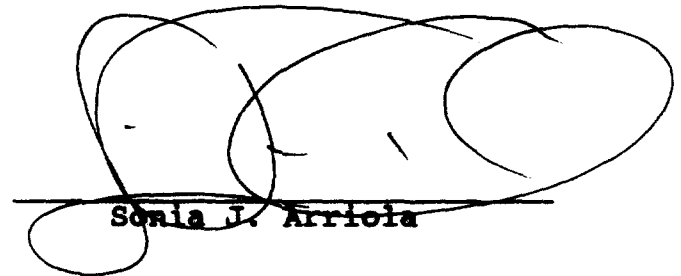


**CERTIFICATE OF SERVICE**

I, Sonia J. Arriola, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 28th day of September, 1993, caused to be sent by hand delivery, a copy of the foregoing PETITION FOR EXPEDITED RULEMAKING to the following:

Mr. Roy J. Stewart  
Chief, Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 314  
Washington, D.C. 20554

Alan Aronowitz, Esq.  
Federal Communications Commission  
2025 M Street, N.W., Room 8002  
Washington, D.C. 20554



Sonia J. Arriola